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| 09/511,780 | 02/23/2000 | Johannes Baensch | 8265-305 | 3549 |

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| EXAMINER | |
|---|---|
| MADSEN, ROBERT A | |
| **ART UNIT** | **PAPER NUMBER** |
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Please find below and/or attached an Office communication concerning this application or proceeding.

| Office Action Summary | Application No. 09/511,780 | Applicant(s) BAENSCH ET AL. | |
|---|---|---|---|
| | Examiner Robert Madsen | Art Unit 1761 | |

*-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --*

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1)☒ Responsive to communication(s) filed on *26 September 2001* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4)☒ Claim(s) *26-38* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *26-38* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

**Application Papers**

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

## DETAILED ACTION

Acknowledgement is made of receipt of the Amendment filed September 26, 2001. Claims 1-25 have been cancelled. New claims 26-38 have been added.

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 26,27,29-34 and 36 are rejected under 35 U.S.C. 102(b) as being anticipated by Huang et al. (US 5175013) as evident by Tamime et al.

Regarding claims 26,27,30-34,and 36, Huang et al. teach 10-20% of non-fat dry milk as recited in claim 30 (column 4, lines 14-34), 8-18% sugar, 10-60% of a yogurt premix as recited in claim 31 (Column 5, lines 12-33) and conventionally has between a bacteria count of $10^4$ to $10^{11}$ per gram as recited in claim 27 (as evident by Tamime, page 393), 6-16% of a hydrolyzed starch of 5-35 DE which would be a maltodextrin as recited in claim 33 (Column 4, line 54 to Column 5, line 4), up to 20% vanilla as recited in claim 34 (Table 1, Column 5, lines 45-49), up to 25% dairy cream of 40% fat (i.e. 0.01%-18% butterfat from cream in Column 5, lines 40-45, and cream shown as 40% fat in the Examples) which inherently would be sufficient to increase smoothness as recited in claim 32, and no salt (i.e. up to 0.5% includes 0%.)

Regarding claim 29, the contribution of fat may comprise egg yolk blend (i.e. a molten fatty substance) that has 24% fat that may be combined with the cream or added alone to the composition (Column 5, lines 40-45).

Claims 26,30,31,33-36 are rejected under 35 U.S.C. 102(b) as being anticipated by Huber et al. (US 4737374).

Huber et al. teach an aerated product as recited in claim 36 comprising: 10-14% yogurt powder as recited in claim 31, 10-20% non-fat dry milk solids as recited in claim 30, 8-30% sugars, 0.01-14% maltodextrin as recited in claim 33, 0.01% to 10% vanilla or fruit flavors as recited in claim 34, 0.01 to 0.15% salt as recited in claim 35, and no added cream as recited in claim 26 (Abstract, Claim 19, Column 5, lines 19-67, Column 6, lines 14-48, Column 7, lines 1-20, Column 9, lines 1-20).

> (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claims 26,30,31,34, and 36 are rejected under 35 U.S.C. 102(e) as being anticipated Rosen (US 5800855) as evident by Cajigas (US 5145697).

Regarding claims 26,30,31, 34,36, Rosen teaches an aerated cream composition as recited in claim 36 comprising 10.3% condensed skim milk as recited in claim 30, 13.3% cream cheese as recited in claim 31, 21.5% dry sugar, 0.1% vanilla extract as recited in claim 34, 24.3% cream, 0.5% of a stabilizing system comprising salt and a stabilizer such as carb bean gum, gaur gum, or carrageen, which are known texturizing agents as evident by Cajigas (See Column, line 2 to Column 6, line 53).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 26,29-36, 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huang et al. (US 5175013) in view of Huber et al. (US 4737374).

Regarding claims 26,29- 36 and 38, Huang et al. teach a product in aerated form (Abstract) as recited in claim 36 which comprises: 10-20% of non-fat dry milk as recited in claim 30 (column 4, lines 14-34), 8-18% sugar, 10-60% of a yogurt premix as recited in claim 31 (Column 5, lines 12-33), of a hydrolyzed starch of 5-35 DE which would be a maltodextrin as recited in claim 33 (Column 4, line 54 to Column 5, line 4), up to 20%

line 4), up to 20% vanilla as recited in claim 34 (Table 1, Column 5, lines 45-49), up to 25% dairy cream of 40% fat (i.e. 0.01%-18% butterfat from cream in Column 5, lines 40-45, and cream shown as 40% fat in the Examples) which inherently would be sufficient to increase smoothness as recited in claim 32, and no salt (i.e. up to 0.5% includes 0%.) Huang et al. are silent in teaching 18-30% sugar, 16-35% texturizing agent, greater than 0% salt, and any other quantity of flavor besides 0.6%. However, varying any amount of sugar, texturizing agent, and flavor would have been obvious result effective variables of their art recognized functions (i.e. sweetness, texturizing/smoothness, and flavor intensity) and mere optimization of a known recipe.

With respect to adding salt to the mixture, as recited in claims 26,35, and 38, applicant has not defined salt in the specification. Taking salt to mean common table salt, or sodium chloride, Huang et al. does teach condiments (Column 5, lines 45-49), which would include salt, and table salt is added for flavor and preservation (i.e. inhibits mold growth). Therefore, to add any particular level of table salt would have been an obvious result effective variable of the desired flavor or mold growth prevention one desired. Taking salt to mean a salt of an acid, Huber et al. are relied on as evidence of the conventionality of adding salts of acids for buffer and flavor balance at 0 to 0.5% (Abstract, Column 7, lines 14-20, Claim 19). Therefore to add any particular level of a salt of an acid between 0 and 0.5% would have been an obvious result effective variable of the desired pH and flavor balance.

Claims 26,30,31,33-36, and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Huber et al. (US 4737374) in view of Singer et al. (US 5202146)

Huber et al. teach a non-fat frozen yogurt which aerated product as recited in claim 36 comprising: 10-14% yogurt powder as recited in claim 31, 10-20% non-fat dry milk solids as recited in claim 30, 8-30% sugars, 0.01-14% maltodextrin as recited in claim 33, 0.01% to 10% vanilla or fruit flavors as recited in claim 34, 0.01 to 0.15% salt as recited in claim 35, and no added cream as recited in claim 26 (Abstract, Claim 19, Column 5, lines 19-67, Column 6, lines 14-48, Column 7, lines 1-20, Column 9, lines 1-20). However, Huber et al. are silent in teaching the addition of cream to the non-fat frozen yogurt, as including in the ranges of claims 26 and 38.

Singer et al. teaches improving the flavor of fat free foods, including ice cream-like desserts, by adding a flavor delivery system comprising heavy cream (i.e. 43% fat) at 1.04% or 0.58% heavy cream (Example 2, Abstract). Singer et al. teach the amount of cream added may be increased such that the total fat addition is less than 1.0% (Example 2, Abstract, Column3, lines 23-45). Therefore, it would have been obvious to add the flavor delivery system at 1.04%, or 0.58% heavy cream, to the product of Huber et al. since the flavor delivery system was designed to improve non-fat frozen dairy products and one would have been substituting one flavoring for another. Furthermore, to add any particular quantity of cream to the product would have been an obvious result effective variable of the fat level of the cream (i.e. heavy cream or medium cream) since Singer et al. teaches the total fat addition should not exceed 1% fat for fat free products.

Claims 26-32,35-38, are rejected under 35 U.S.C. 103(a) as being unpatentable over Kingham et al. (US 4721622) in view of Saintain (US 5573793).

Regarding claims 26-28,30-32,35,37,38, Kingham et al. teaches a cream filling comprising 40% cream cheese as recited in claim 31, 20.8% double cream which would be in an amount sufficient to increase the smoothness of the mixture as recited in claim 32 since double cream is known to at least 36% fat, 3.12% of a texturizing agent (i.e. maize starch) , 0.11% of an aromatic product (i.e. spices) (See example 1). In another example, Kingham et al. teaches uses yogurt as the fermented dairy product ,which are known in the art to be between $10^4$ to $10^{11}$ per gram as recited in claim 27,and includes a sugar. Kingham et al. teaches the creams have a water activity of anywhere from 0.2 to 0.99, as recited in claim 28, and that they are in a biscuit, or dough based product, as recited in claim 37. Additionally Kingham et al. teach the creams may be either sweet or savory (Column 4, lines 32-67).

Although Kingham et al. is silent in teaching a milk derivative per se, Kingham et al. teach 20.8% milk which would be the equivalent to at least 18.3% unskimmed powdered milk as recited in claim 30(i.e. whole milk is 88% moisture), and one would have been substituting one source of milk solids for another.

Although Kingham et al. are silent in teaching up to 0.5% salt as recited in claims 26,35 and 38 and 8 to 30% sugar as recited in claims 26 and 38, Kingham et al. do teach that the fillings may be of either sweet or savory compositions, and clearly the examples are savory filling (with spices, onions, pepper and bacon). Saintain is relied on as further evidence of the conventionality of fillings for dough product comprising a

fermented dairy product (i.e. yogurt), a milk protein source, a fat source, sugars, and texturizing agents wherein with water activities are within the same range as Kingham et al. (i.e. from 0.75 to 0.86), but teaches an example of a sweet filling (i.e. high sugar, no salt ). Additionally, Saintain further teaches the water activity may be lowered by adding sugar to the composition (Abstract, Column 1, lines 20-65, Column 3, lines 10-35). Therefore, to select any particular level of sugar, as recited in claims 26 and38 would have been an obvious result effective variable of both the desired water activity as well as the desired sweetness. Likewise, to select any lower level of salt, as recited in claims 26,35, and 38 would have been an obvious result effective variable of the desired flavor (i.e. savory or sweet).

Regarding claim 29, Kingham et al. teach adding fat to the fermented dairy product via heavy cream , dried cream, and milk, but are silent in teaching molten fatty substances. However, Saintain teaches adding milk proteins separately with vegetable oil in the same fat content range as the milk/cream products taught by Kingham et al. (Column 2, line 62 to Column 3, line6, Column 4, line 45-55). Therefore, to add any particular level of molten fatty substances would have been an obvious result effective variable of the (1) desired fat level in the product and (2) the amount of dairy fat provided.

### *Response to Arguments*

Applicant's arguments with respect to the cancelled claims have been considered but are moot in view of the amendment and new ground(s) of rejection.

***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Hynes et al. (US 3929892), Schroeder et al. (US 4913921), and Banach et al (US 5252352) teach cream compositions comprising fermented milk products combined with other dairy ingredients. Dally et al. (US 6299916 B1), and McGlynn et al.( US 6322829 B1) teach fillings comprising fermented milk products.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 6:30AM-4:00PM M-F (except alternate Fridays).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)305-7718 for regular communications and (703)305-7718 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.

Robert Madsen
Examiner
Art Unit 1761
December 14, 2001

MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700